E COPY

FILED
MAR 2[illegible] 1955
HAROLD B. WILLEY, Clerk

NO. 679

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

GORDON SMITH, *Petitioner*

VS.

THE STATE OF TEXAS, *Respondent*

APPLICATION FOR WRIT OF CERTIORARI

BLEED THROUGH POOR COPY

INDEX

Opinion from which this Proceeding is Taken 1

Grounds on Which the Jurisdiction of this Court is Invoked 2

Questions presented for Review:

(a) Question No. 1 3

(b) Question No. 2 4

(c) Question No. 3 5

Constitution and Statutory Provisions Involved 6

Statement of the Case 7

Argument in Support of Question No. 1 concerning Shifting of Burden of Proof to Defendant 13

Argument in Support of Question No. 2 concerning Trial Court's Assumption of One of the Essential Elements of the Offense Charged 17

Argument in Support of Question No. 3 concerning Failure of Trial Court to Give Charge on Circumstantial Evidence 20

INDEX OF AUTHORITIES

Adams vs. State, 20 S.W. (2nd) 772 15

Carothers vs. U. S., (5th CCA) 161 Fed. (2d) 718 18

Claunch vs. State, 198 S.W. 307 16

Coffin, et al, vs. U. S., 15 S.C. 394, 156 U. S. 432, 39 L. Ed. 481 14

Dolan vs. U. S., (9th CCA) 123 Fed. 52 18

Foster vs. State, 262 S.W. (2nd) 408 16

Leland vs. State of Oregon, 72 S. C. 1002, 343 U.S. 790, 96 L. Ed. 1302 14

Lilienthal vs. U. S., 97 U. S. 237, 24 L. Ed. 901 14

Miller, et al, vs. U. S., (10th CCA) 120 Fed. (2d) 968 18-19-20

Quercia vs. U. S., 53 S.C. 698, 289 U. S. 466, 77 L. Ed. 1321 17-18

Randell vs. State, 90 S.W. 1012 16

Sain vs. State, 148 S.W. 566 15-16

Title 28, USCA, Section 1257, Page 88 6

U. S. vs. Gooding, 6 L. Ed. 693 14

U. S. vs. Meltzer, (7th CCA) 100 Fed. (2nd) 739 18

U. S. vs. Klein, (7th CCA) 100 Fed. (2nd) 739 18

United States Constitution, Amendment VI
USCA Constitution, Amendments 1 to 13, Page 326 6

United States Constitution, Admendment V
USCA Constitution, Amendments 1 to 13, Page 102 6

United States Constitution, Amendment XIV
USCA Constitution, Amendment 14 to End, Page 2 6

Vernon's Texas Penal Code, Vol. 2, Page 221 6-7

BLEED THROUGH POOR COPY

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

GORDON SMITH

VS.

THE STATE OF TEXAS

APPLICATION FOR WRIT OF CERTIORARI

OPINION FROM WHICH THIS PROCEEDING IS TAKEN

This Application for Writ of Certiorari is from an opinion of the Court of Criminal Appeals of the State of Texas, which opinion is reported in 273 SW (2d) 623. Copy of such opinion is appended hereto. Said opinion was rendered and entered on November 10, 1954. Applicant's Motion for Re-hearing was overruled without written opinion on January 5, 1955. On January 19, 1955, the Texas Court of Criminal Appeals recalled its mandate and ordered a stay of proceedings for ninety days to permit the filing of this Application for Writ of Certiorari.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

In each of the three particulars specified below, this Applicant has been denied due process of law, as guaranteed by the 5th and 14th Amendments to the Constitution of the United States and has also been denied the right to a trial by an impartial jury, as guaranteed by the 6th Amendment to the Constitution of the United States.

(a) The opinion of the Texas Court of Criminal Appeals approved the action of the trial court in which there was placed upon this Applicant as the Defendant in the trial court in a criminal case the burden of proving his innocence with respect to one of the essential elements of the offense charged.

(b) The Texas Court of Criminal Appeals has deprived Applicant of his constitutional right of trial by jury as guaranteed by the 6th Amendment in that it has approved action of the trial court wherein an assumption was made in the charge to the jury in a criminal case that one of the essential elements of the offense charged should be taken as proved, and that it had been established without a consideration thereof by the jury.

(c) The Texas Court of Criminal Appeals has approved action of the trial court in refusing to charge on the law of circumstantial evidence in a criminal case where there is no direct evidence of one of the essential elements of the offense charged, but the only evidence is upon related facts which are only persuasive of the essentials of such main and essential fact.

BLEED THROUGH POOR COPY

QUESTIONS PRESENTED FOR REVIEW

Applicant submits that herein there are three questions presented for review.

QUESTION No. 1: In a State Court criminal prosecution, will the trial court be permitted to require of the defendant that he prove, or at least present sufficient proof to raise a reasonable doubt in the minds of the jury, that he was not guilty of one of the essential elements of the offense charged?

Applicant was charged with murder with a motor vehicle while under the influence of intoxicating liquor and while then and there acting through accident or mistake. One of the essential elements of the offense to be proved by the State was that defendant's operation of the automobile was a mistake or accident, and thus operated in a manner other than a sober person would have operated it. The trial court recognized this as an essential element, but in its charge, placed upon the defendant the burden of proving, or at least raising a reasonable doubt in the minds of the jury, as to whether the defendant was guilty of this essential element, all in the following language, to-wit:

> "You are further instructed that even though you believe and find from the evidence beyond a reasonable doubt that the defendant was intoxicated or was under the influence of intoxicating liquor, while operating his automobile at the time and place of the accident in question, if he was he would not be guilty as charged if he was operating his automobile in the same way and manner, under the circumstances, that it would be operated by a person not intoxicated and not under the influence of intoxicating liquor; and if

you find from the evidence that at the time and place in question the Defendant was operating his automobile in the same way and manner, under the circumstances, that it would be operated by a person not intoxicated, and not under the influence of intoxicating liquor, you will find the defendant not guilty, or if you have a reasonable doubt thereof you will acquit him." (Transcript of Record, Page 16).

QUESTION No. 2: In the trial of a State court criminal case, will the trial judge be permitted to assume in the language of his charge to the jury that one of the essential elements of the offense charged should be taken as established in the absence of an admission thereof by the defendant?

One of the essential elements to be proved by the State in this type of prosecution is the causal connection between the intoxication of defendant and the death with which he stands charged. The trial court, instead of instructing the jury that they must find *that* the intoxication resulted in the death of an individual, used lanquage which, most logically construed, informed the jury that the intoxication resulted in the death of an individual, as follows:

"Before you can convict the Defendant in this case, you must find and believe from the evidence beyond a reasonable doubt that the defendant, Gordon Smith, on the occasion in question, was intoxicated or was under the influence of intoxicating liquor, *and which resulted in the death of the said Susana Martinez,* and that he was driving his automobile while in such condition at the time of the collision, in question, and if the evidence raises a reasonable doubt in your minds as to any of these matters, you will find the Defend-

BLEED THROUGH POOR COPY

ant not guilty." (Transcript or Record, Pages 15 and 16) (Emphasis ours).

QUESTION No. 3: In a State Court prosecution for murder with a motor vehicle while under the influence of intoxicating liquor, when the record reveals there are no eye witnesses and no direct evidence pertaining to the identity of the driver of said automobile at the time of the collision, can the trial court deny the defendant a charge upon the law of circumstantial evidence with respect to whether or not the defendant was the actual driver of the automobile involved in the collision?

The last person to see the defendant driving his automobile, which was involved in the collision, saw him driving the automobile approximately 15 minutes prior to the collision and at that time he was driving his car in the opposite direction from and at a place substantially distant from, the scene of the collision. There is no direct evidence that the defendant was driving the car at the time of the collision and no witness has identified defendant as driving at such time. Shortly after the collision and after the noise thereof had ceased and after all of the dust which may have arisen therefrom had settled, the first person to identify this defendant at the scene of the wreck found him lying on his back on the ground with the car door on the driver's side open and with defendant's feet lying in the front floor board of the driver's side of the car. A summary of all of such testimony, together with references as to where it may be found in the Statement of Facts, appears at Page 67 to 70 of the Transcript of Record.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Applicant respectfully submits that three amendments to the United States Constitution have been ignored by the Court of Criminal Appeals of the State of Texas, which amendments are as follows:

> Amendment VI, "United States Constitution, USCA Constitution, Amendments 1 to 13," Page 327.
>
> Amendment V, "United States Constitution, USCA Constitution, Amendments 1 to 13," Page 102.
>
> Amendment XIV, "United States Constitution, USCA Constitution, Amendment 14 to End," Page 2.

This Writ of Certiorari is applied for under the provisions of Title 28 USCA, Section 1257, Page 88. The applicable portions of it are as follows:

> "Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

This case involved the trial of a criminal matter under Article 802c of the Penal Code of the State of Texas, which reads as follows:

BLEED THROUGH POOR COPY

"Any person who drives or operates an automobile or any other motor vehicle upon any public road or highway in this State, or upon any street or alley or any other place within the limits of an incorporated city, town or village, while such person is intoxicated or under the influence of intoxicating liquor, and while so driving and operating such automobile or other motor vehicle shall through accident or mistake do another act which if voluntarily done would be a felony, shall receive the punishment affixed to the felony actually committed." Vernon's Texas Penal Code, Vol. 2, P. 221.

STATEMENT OF THE CASE

Upon a jury trial in a Texas State District Court, this Applicant was found guilty and sentenced to a two-year penitentiary term for the offense of murder with a motor vehicle while operating the same upon a public highway in the State of Texas, and while under the influence of intoxicating liquor, all through mistake or accident. A statement as to the facts pertinent to the questions here presented is set out under each respective question, in the immediately preceding section of this Application.

These questions were raised timely and properly in both the trial court and the Appellate State Court, as follows, to-wit:

(a) Raising of Question No. 1 Concerning Violation of Defendant's Presumption of Innocence:

Prior to the submission of the court's complained of charge to the jury, defendant excepted thereto in the following language, to-wit:

"The Defendant further excepts to the Court's charge as a whole, and particularly to Paragraph 9 thereof, beginning at the semi-colon approximately in the middle of the paragraph, and with the words "And if you find from the evidence that at the time and place in question the Defendant was operating his automobile . . . " for the reason that such language places upon the Defendant the burden of proof rather than upon the State, and thus requires of the Defendant a greater burden than is required by law." (Transcript of Record, Page 55).

This exception was overruled. (Transcript of Record, P. 56).

This same matter was presented to the Court of Criminal Appeals in Appellant's Original Brief, Pages 74 - 83, Transcript of Record, the point there being argued having been expressed in said brief, as follows, to-wit:

"One of the elements which the State must prove beyond a reasonable doubt, in order to support a conviction in this type of case, is that the Defendant operated his automobile at the time and place in question in a manner different and less prudent than the manner in which a sober person would have operated the automobile under the same circumstances; therefore, the trial Court committed reversible error in submitting in its charge to the jury that the Defendant had the burden of proof to at least raise a reasonable doubt in the minds of the jury to the effect that he was operating his automobile in the same manner a sober person whould have operated it." (Transcript of Record, Page 74).

This same point was raised and argued in Appellant's Motion for Rehearing in the Texas Court of Criminal Appeals, Pages 163 and 168 of the Transcript of Record, said point being stated as follows:

> "The Trial Court committeed reversible error in submitting its charge, whereby the Defendant had the burden of raising at least a reasonable doubt in the minds of the jury that he was operating his automobile in the same manner that a sober person would have operated it." (Transcript of Record, Page 163).

This same point was again raised in the Texas Court of Criminal Appeals in Appellant's Motion to Withdraw Mandate, Transcript of Record, Page 182, 187 and 188, and there the proposition was stated as follows:

> "(c) In paragraph 9 of the trial court's charge, there was placed upon the defendant the burden of proving his innocence, or at least raising a reasonable doubt thereof, with respect to one of the essential elements that the State must prove in this type of case, namely accident or mistake caused by intoxication; and thus the defendant was deprived of his right of presumption of innocence in violation of the provisions of the Constitution of the United States." (Transcript of Record, Page 182).

(b) Raising of Question No. 2 Concerning Trial Court's Assumption of One of the Essential Elements of Offense Charged:

Prior to the submission of the trial court's charge to the jury, the defendant specially excepted to the language of Paragraph 8 of the charge "and which resulted in the death of the said Susana Martinez" for the reason that the

same did not require the State to prove this element of the offense, all as set forth in the following language:

> "The Defendant further especially excepts to the Court's charge as a whole, and particularly to Paragraph 8 thereof, and particularly to the language "And which resulted in the death of the said Susanna Martinez" for the reason that such language, when used in the position and manner that it is used in the Court's charge, is of a nature as to mislead the jury that the Court is of the opinion that the intoxication of the Defendant resulted in the death of Susanna Martinez, and that thus the Defendant is guilty and constitutes a comment on the weight of the evidence, and places a greater burden upon the Defendant than is required by law, in that the same does not require the State to prove the death of the said Susanna Martinez beyond a reasonable doubt and assumes that the said Susanna Martinez was killed, and such language is unintelligible, confusing and misleading to the jury." (Transcript of Record, Page 54).

This exception was overruled (Transcript of Record, Page 56).

This matter was raised in the Original Brief of Appellant in the Texas Court of Criminal Appeals (Transcript of Record, Pages 83-94) and the point was there summarized to the Court, as follows:

> "The Trial Court committed reversible error in using language in Paragraph 8 of its charge whereby the Court concluded that the intoxication of the Defendant resulted in the death of another party involved in the wreck, because the causal connection between intoxication, if any, on the one hand, and the death

BLEED THROUGH POOR COPY

upon the other, was one of the elements of the offense which was in question and subject to determination by a jury verdict." (Transcript of Record, Page 83).

Applicant again raised this same point in his Motion for Rehearing in the Texas Court of Criminal Appeals (Transcript of Record, Pages 173 and 174):

> "Trial Court committed reversible error in assuming the guilt of the Defendant in its charge in the following two respects:
>
> (a) That the intoxication of the Defendant resulted in the death of another party;" (Transcript of Record, Page 173).

Applicant again raised this same point in his Motion to Withdraw Mandate in the Texas Court of Criminal Appeals (Transcript of Record, Page 181, 183-187), and the proposition was there stated, as follows:

> "(a) The trial court, in Paragraph 8 of its charge, assumed as an undisputed fact that Appellant's intoxication 'resulted in the death of the said Susana Martinez', and thus deprived Appellant of his constitutional right of trial by jury upon one of the essential elements of the offense charged." (Transcript of Record, Page 181).

(c) Raising of Question No. 3 Concerning Failure of Trial Court to Give Charge on Circumstantial Evidence:

Prior to the submission of the Court's charge to the jury, this Applicant requested the court to charge the jury on the law of circumstantial evidence, as follows:

"Gentlemen of the Jury:

You are instructed, as a part of the law of this case, that the State relies for a conviction upon circumstantial evidence, and in order to warrant a conviction on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proven by competent evidence beyond a reasonable doubt; all the facts, that is, the facts necessary to the conclusion must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion, and producing, in effect, an honorable and moral certainty that the accused, and no other person, committed the offense charged. It is not sufficient that the circumstances coincide with, account for, and therefore render probable the guilt of the Defendant; they must exclude every other reasonable hypothesis except that of the Defendant's guilt, and unless they do so beyond a reasonable doubt, you will find the Defendant not guilty." (Transcript of Record, Page 40).

This request was denied (Transcript of Record, Pages 40 and 41).

Also, prior to the submission of the charge to the jury, this Applicant excepted to the failure of the Court to submit said specially requested instruction (Transcript of Record, Page 55). This exception was overruled (Transcript of Record, Page 56).

In this Applicant's Original Brief to the Texas Court of Criminal Appeals, he raised this same point with respect to circumstantial evidence and there reviewed all pertinent evidence. (Transcript of Record, Pages 66-73). The point was there stated:

"There being no positive or direct evidence upon the

BLEED THROUGH POOR COPY

issue as to whether or not the Defendant was the driver or operator of his car at the time of the collision, the Trial Court committed reversible error in refusing, after request of the Defendant, to charge the jury upon circumstantial evidence." (Transcript of Record, Page 66).

In Appellant's Motion for Re-hearing, this same matter was again presented to the Texas Court of Criminal Appeals (Transcript of Record, Page 168 - 173), and stated in the following language:

> "There being no direct evidence upon the issue as to whether or not the Appellant was driving the car at the time of the collision, the Trial Court committed reversible error in refusing, after request by Defendant, to charge the jury upon the law of circumstantial evidence." (Transcript of Record, Page 168).

In Appellant's Motion to Withdraw Mandate, this same point was again urged to the Texas Court of Criminal Appeals (Transcript of Record, Pages 182, 188) and was stated as follows:

> "(d) This being a case in which the State relied for a conviction solely upon circumstantial evidence, the Appellant, under due process of law guaranteed by the Constitution of the United States, was entitled to a charge upon circumstantial evidence, which charge was denied him by the trial court." (Transcript of Record, Page 182).

ARGUMENT IN SUPPORT OF QUESTION NO. 1 CONCERING SHIFTING OF BURDEN OF PROOF TO DEFENDANT.

In our system of jurisprudence, it is so fundamental that

the burden of proof as to all elements of the offe[nse charg]ed rests upon the prosecution, and in no part [and to no] extent upon the defendant, that we do not here [submit an] extensive list of authorities in support thereof, bu[t cite only] a few cases by this Court which have recog[nized this] fundamental right of the individual citizen. S[ee the fol]lowing:

(a) Coffin, et al, vs. U. S., 15 S.C. 394, 156 U. S. 432, 39 L. Ed, 481, where Mr. Justice White said:

> "The principle that there is a presumption [of inno]cence in favor of the accused is the undou[bted law,] axiomatic and elementary, and its enforcem[ent lies at] the foundation of the administration of ou[r criminal] law.".

(b) Leland vs. State of Orgeon, 72 S. C. 1002, 343 U. S. 790, 96 L. Ed. 1302.

(c) Lilienthal vs. U. S., 97 U. S. 237, 24 L. Ed. 901, wherein Mr. Justice Clifford, speaking for the C[ourt, said:

> "In criminal cases the true rule is that the [burden of] proof never shifts; that in all cases, before a [conviction] can be had, the jury must be satisfied fro[m the evi]dence, beyond a reasonable doubt of the a[ffirmative] of the issue presented in the accusation, th[at the de]fendant is guilty in the manner and form a[s charged] in the indictment."

(d) U. S. vs. Gooding, 6.L. Ed. 693.

This same rule of law has been recognized by [the Texas] Court of Criminal Appeals in other cases, which [the Texas] Court of Criminal Appeals has now refused to f[ollow, and] these other cases wherein the jury charges were [very simi]lar to that here involved are:

BLEED THROUGH POOR COPY

(a) In the case of *Adams vs. State, 20 S. W. (2d) 772,* the pertinent portion of the charge read:

> " 'However, if you find from the evidence in this case that the defendant did not in Crosby County, Texas, on or about the 16th day of May, A. D. 1927, unlawfully sell to Clem A. Harkey, spirituous liquors capable of producing intoxication, or if you have a reasonable doubt thereof, then in either event you will find the defendant not guilty, and so say by your verdict'."

The Texas Court of Criminal Appeals condemned this language:

> "This charge should not have been given. Similar charges have been condemned by this court."

(b) In the case of *Sain vs. State, 148 S. W. 566,* the pertinent portion of the charge was as follows:

> " 'If you believe the defendant did not engage in or pursue the occupation of selling intoxicating liquors in Hunt County, Texas, between the 1st day of June, 1911, and the 5th day of June, 1911; or if you believe he did not make as many as two sales of intoxicating liquors to the parties named in the indictment; or if you have a reasonable doubt as to either of these or as to the defendant's guilt, you will acquit him'."

The Court condemned this language of the charge as follows:

> "Taking this charge as given, in the light of the qualification at the end of the quoted charge, with reference to reasonable doubt, the jury may not have been misled, but it is advisable and better not to use this character of language in instructing the jury. The jury does not have to believe beyond a reasonable

doubt anything except the guilt of the defendant. This character of charge should, in substance and as a matter of law, be given so as to place the reasonable doubt clearly in favor of, and not against, the accused. The law is that, unless the defendant is shown beyond a reasonable doubt to have followed the business or pursued the occupation, he would not be guilty, and the jury must be clearly charged that the reasonable doubt is always in favor of the defendant."

(c) See the cases of *Claunch vs. State, 198 S. W. 307, Randell vs. State, 90 S. W. 1012.*

Although the Court of Criminal Appeals of the State of Texas, in its opinion, has refused to discuss this point, other than to say that the burden of proof was not shifted, we must assume that the Honorable Texas Court has taken this position by reason of the language: "or if you have a reasonable doubt thereof, you will acquit him". If it had not been for that language, this certainly would have been a clear case of requiring the defendant to disprove one of the elements of the offense charged, and the case would have fallen exactly in the same category as the recent case decided by the Texas Court of Criminal Appeals, *Foster* vs. *State*, 262 S. W. (2d) 408. However, in this case, by adding the words: "or if you have a reasonable doubt thereof, you will acquit him", the trial court only lessened the degree of defendant's burden of proof, and only required defendant to go so far as to raise a reasonable doubt in the minds of the jury that he may have been driving his automobile as a sober person should have driven it. Reducing the amount of proof required of the defendant did not remove the vice in this charge. The real vice in this charge is that it requires of the defendant any character of proof in a criminal case.

BLEED THROUGH POOR COPY

Possibly this is a subtle encroachment upon the liberty of free men, but the subtle nature thereof does not make it any less certain as an encroachment. We respectfully submit that it is the subtle encroachment upon the liberty of free men that must be most constantly, conscientiously and intelligently guarded against. It is a dangerous precedent for any Court to ever be permitted, in a criminal case, to require of the defendant to proceed with any character of proof of his innocence. This precedent should not be permitted in the instant case.

ARGUMENT IN SUPPORT OF QUESTION NO. 2 CONCERNING TRIAL COURT'S ASSUMPTION OF ONE OF THE ESSENTIAL ELEMENTS OF THE OFFENSE CHARGED

It is an invasion of the right to a trial by jury for the trial court to pass upon and determine any element of the offense charged because it is the exclusive province of the jury to make its decision with respect to each of such elements based upon the evidence alone This Honorable Court has recognized this fact, that the trial judge should not invade this province of the jury, in the case of *Quercia* vs. *U. S.*, 53 S. C. 698, 289 U. S. 466, 77 L. Ed. 1321, in which it was said:

> "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling'. This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be given as not to mislead, and especially that it should not be one-sided;' that 'deductions and

theories not warranted by the evidence should be studiously avoided'." (77 L. Ed. at Page 1325).

Various Circuit Courts of Appeal have also recognized that the trial judge can not assume as established an element of the offense charged, but must leave such a finding to the jury. See the following cases:

(a) Dolan vs. U. S., 9th CCA, 123 Fed. 52, wherein the trial court's charge included the following language:

". . . and that when said Wilson Misener used the pronoun 'he' in the conversation testified to by Palmer, he meant . . .".

The Circuit Court recognized that the province of the jury had been invaded:

"We are of the opinion that the court invaded the province of the jury in the giving of this instruction in that: That he assumed as an established fact that Misener made the statement testified to by Palmer instead of leaving this question of fact to be decided by the jury, contrary to the well settled principles of law . . ." .

(b) See cases of *U. S.* vs. *Meltzer* and *U. S.* vs. *Klein,* 7th CCA, 100 Fed. (2d) 739; *Carothers* vs. *U. S.,* 5th CCA 161 Fed. (2d) 718.

(c) Miller, et al, vs. U. S. 10th CCA, 120 Fed. (2d) 968, wherein the Court laid down the sound and wholesome rule:

"It is not sufficient that an instruction be so drawn that a jury may reach the right conclusion, but it is required that it be so framed that a jury may not draw the wrong conclusion therefrom."

BLEED THROUGH POOR COPY

Analyzing the court's charge hereinabove quoted, it is apparent that the court cleary indicated to the jury the particular issues that were there submitted by the use of the word "that". In other words, the trial court said that in order for a "guilty" verdict to be rendered, it was necessary that the jury believe beyond a reasonable doubt *that* the defendant was intoxicated, "and which resulted in the death of the said Susana Martinez," and *that* the defendant was driving his automobile while in such condition. (Emphasis ours). Every specific issue to be determined by the jury was preceded in this charge by the word "that". Also every such issue was so worded that it could have been lifted out of the charge, and, standing alone, would have still been intelligible. On the other hand, the words "and which resulted in the death of the said Susana Martinez" were not preceded by nor connected with the word "that"; and when lifted out of the charge and standing alone, these words are not intelligible. The only way they can be analyzed and make any sense whatever is by considering the use of the word "which" as relating back to the issue of the defendant's intoxication, and when so related back, these words constitute a conclusion upon the part of the court that the intoxication of the defendant resulted in the death of Susana Martinez. Thereby the jury was not instructed that in order to find the defendant guilty, it was necessary *that* they believe that such intoxication resulted in the death of Susana Martinez, but rather they were told that it did result in such death.

As stated in the *Miller* case above, it is not sufficient that an instruction be so drawn that a jury may reach the right conclusion, but it is required that it be so framed that a jury can not draw the wrong conclusion therefrom.

ARGUMENT IN SUPPORT OF QUESTION NO. 3 CONCERNING FAILURE OF TRIAL COURT TO GIVE CHARGE ON CIRCUMSTANTIAL EVIDENCE

The right of a fair trial by jury guaranteed by the 6th Amendment to our Constitution includes the right of proper court procedure and proper instructions to the jury, and includes the right to a charge upon the law of circumstantial evidence in a proper case. See the case of *Miller, et al,* vs *U. S.*, 10th CCA, 120 Fed. (2) 968:

> "The bars which guard the right to a fair trial, such as is guaranteed by our Constitution, include court procedure, rules of evidence and proper instructions to the jury. These bars must not be lowered."

This rule of law is well established. Therefore, the real question for this Court to determine is whether or not this rule is applicable to the present fact situation. Direct and circumstantial evidence are distinguished as different kinds of evidence and not different degrees of persuasiveness of the same kind of evidence. Direct evidence is evidence of the main fact, such as a witness testifying: "I saw John eat a red apple". Circumstantial evidence is evidence of related facts which tend to be persuasive of the truth of the main fact, such as a witness testifying: "I saw John at 10:00 o'clock with a red apple, and 10:30 I saw John with an apple core". The evidence of the related facts is persuasive to a conclusion of the main fact, but regardless of its persuasiveness, it is still not evidence of the main fact.

BLEED THROUGH POOR COPY

Rather than review the testimony of each witness, reference is made to the Statement of Facts as to each particular item of evidence, all as was done in this Applicant's Original Brief to the Texas Court of Criminal Appeals (Transcript of Record, Page 66-70). This Applicant here states without reservation that the substance of all of such evidence was simply: (1) That about 15 minutes prior to the collision involved, defendant was seen driving his car in the opposite direction and at some distance, from the scene of the accident; and (2) No eye witness to the collision identified the defendant as the driver of his car, but shortly after the collision, and after the dust had settled, the first witness to identify the defendant found him lying on his back on the ground with his feet up in the floor boards of the driver's side of his own car.

There is no direct evidence that the Applicant herein was driving his own car at the time of the collision. It is admitted that there is direct evidence of related facts and that it is persuasive of the main fact, but still this constitutes only circumstantial evidence. Under such circumstances, the defendant should have been granted his request for a charge upon the law of circumstantial evidence.

Premises considered, this Applicant respectfully prays that this Honorable Court grant this Application for Writ of Certiorari and that upon due consideration thereof, it be recognized by a decree of this Court that this Appli-

cant has been deprived of his Constitutionally guaranteed right of a trial by jury and of due process of law.

Respectfully submitted.

KARL L. LOVELADY
Attorney at Law
Muleshoe, Texas.

HAROLD O. HARRIGER &
NELSON & McCLESKEY
Attorneys at Law,
Central American Life Bldg.
Lubbock, Texas.

Attorneys for Applicant,
GORDON SMITH.

Of Counsel:

Geo. W. McCleskey
Geo. W. McCleskey

BLEED THROUGH POOR COPY

APPENDIX

GORDON SMITH, Appellant,

v.

THE STATE OF TEXAS, Appellee.

No. 27062

Court of Criminal Appeals of Texas. Nov. 10, 1954.

Defendant was convicted of murder committed while driving while intoxicated. The District Court, Bailey County, E. A. Bills, J., rendered judgment and defendant appealed. The Court of Criminal Appeals, Belcher, C., held that evidence was sufficient to sustain finding that defendant had been intoxicated at the time of collision.

Judgment affirmed.

1. AUTOMOBILES – 355 (13)

In prosecution for murder committed while driving while intoxicated, evidence sustained finding that defendant had been intoxicated at time of accident. Vernon's Ann. P. C. art. 802c.

2. CRIMINAL LAW – 814 (17)

When facts proven are in such close juxtaposition to the main fact to be proved as to be equivalent to direct testimony, a charge on circumstantial evidence is not required.

3. CRIMINAL LAW – 814 (17)

In prosecution for murder committed while driving while intoxicated, evidence on issue whether defendant had been driving his automobile at the time and place in question proved facts in such close juxtaposition to the

main fact as to be equivalent to direct testimony, and submission on charge of circumstantial evidence was not required.

4. AUTOMOBILES – 357.

In prosecution for murder committed while driving while intoxicated, charge did not place burden on defendant to prove that he was operating his automobile in the same manner as a sober person would have operated it under the same circumstances.

5. CRIMINAL LAW – 762 (1).

Charge, in prosecution for murder committed while driving while intoxicated, that it must be found beyond a reasonable doubt that defendant's intoxication resulted in victim's death, did not convey to jury trial court's opinion that intoxication had resulted in death, and was not a comment on evidence.

6. CRIMINAL LAW – 438.

In prosecution for murder committed while driving while intoxicated, photographs of the automobiles, shown by person who took them to have been taken soon after the wreck and to depict correctly the positions of the automobiles and their condition, were admissible.

Karl L. Lovelady, Muleshoe, George E. Gilkerson, Sudan, Nelson & McCleskey, Lubbock, for appellant.

Joe Sharp, Dist. Atty., Plainview, Wesley Dice, State's Atty., Austin, for the State.

BELCHER, Commissioner.

Appellant was convicted for the murder of Susana Martinez under Art. 802c, Vernon's Ann. P. C.; the punishment, two years in the penitentiary.

BLEED THROUGH POOR COPY

The State's testimony shows that appellant, while intoxicated and driving his automobile upon a public highway at a fast rate of speed, turned to his left-hand side of the highway and struck the Martinez automobile approaching from the opposite direction, the collision resulting in the death of Susana Martinez and four other Martinez children, who were passengers in said automobile. The driver of the Martinez automobile was unable to identify appellant as the driver of the other automobile.

Appellant did not take the witness stand but offered a witness who testified that she smelled intoxicating liquor on the breath of Lucas Martinez at the hospital soon after the wreck.

It is contended that the evidence was insufficient to show that appellant was intoxicated at the time of the collision.

(1) The state's proof shows that appellant bought and drank some whiskey "about noon" on the day in question. Later, between 2 and 3 P.M. that day, he had whiskey on his breath and, from their observation of appellant, several of the state's witnesses expressed the opinion that he was intoxicated. It was further shown that he had a "sweet odor to his breath" at the hospital soon after the collision. This evidence is sufficient to warrant the jury finding that appellant was intoxicated at the time of the collision.

Appellant strenuously insists that there is no direct evidence that he was driving the automobile that collided with the Martinez automobile and that the trial court erred in failing to charge the jury on circumstantial evidence.

The state's testimony shows that appellant was driving his automobile at noon on the day in question, later that

day appellant was in said automobile at a filling station in Muleshoe; that about "ten or fifteen minutes" after he drove his automobile from the station alone, a witness there heard sirens and ambulances and went to the scene of the collision and there saw the same automobile that appellant drove from the station.

The state further proved that the first persons to the scene of the wreck found appellant lying on his back on the ground with his feet in the Chevrolet automobile and and that they didn't see any other person in or near the Chevrolet automobile at the time they arrived.

Also, the ambulance driver arrived at the scene of the collision soon after it happened and found appellant under the left-hand door of his automobile with his feet "in the floor board on the driver's side."

(2) When the facts proven are in such close juxtaposition to the main fact to be proved as to be equivalent to direct testimony, a charge on circumstantial evidence is not required.

(3) We are of the opinion that the facts proved by the state constitute direct evidence that the appellant was driving his automobile at the time and place in question and the submission of a charge on circumstantial evidence was not required. Landry v. State, 156 Tex. Cr. R. 350, 242 S. W. (2d) 381.

We find the evidence sufficient to support the verdict of the jury.

Appellant contends that the court erred in his charge because it placed the burden on him to prove that he was operating his automobile in the same manner as a sober person would have operated it under the same circum-

BLEED THROUGH POOR COPY

stances, and again erred therein by assuming that there was an accident which was a comment on the weight of the evidence.

(4) The court, in his main charge, instructed the jury upon the law of presumption of innocence and reasonable doubt, made application of the law to the facts of the case and, among other matters, required the jury to find beyond a reasonable doubt that even though appellant was intoxicated and operating said automobile, if they found from the evidence that he was operating said automobile in the same manner as a person not intoxicated would have operated it, or if they had a reasonable doubt thereof, to acquit him.

We think that the charge did not improperly place the burden of proof, as contended by appellant.

(5) Appellant's objections to Paragraph 8 of the charge were that it conveyed to the jury the opinion of the court that accused's intoxication resulted in the death of Susana Martinez and is a comment upon the evidence. Said paragraph submits the converse of this matter and charges the jury that the same must be found beyond a reasonable doubt before they can convict, therefore, no error is shown.

(6) Complaint is made of the introduction of certain pictures of the automobiles involved in the collision. It was shown by the person taking the pictures that they were taken soon after the wreck and correctly depicted the positions of the automobiles and their condition at that time. We think they were properly identified and were admissible in evidence.

The judgment of the trial court is affirmed.

Opinion approved by the Court.

BLEED THROUGH POOR COPY

APPENDIX -

STATE OF TEXAS
COUNTY OF TRAVIS

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, Glenn Haynes, Clerk of the Court of Criminal Appeals of Texas, at Austin, do hereby certify that Cause No. 27,062, styled GORDON SMITH v. STATE OF TEXAS, was affirmed by this Court on November 10, 1954, Appellant's Motion for Rehearing overruled, Without Written Opinion, on January 5, 1955, Mandate issued January 7, 1955, and Order Recalling Mandate to permit Application for Writ of Certiorari to The Supreme Court of the United States issued and filed on January 19, 1955.

THEREFORE, this cause was disposed of by this Court with the overruling of Appellant's Motion for Rehearing and mandate would not have been withdrawn if Appellant had not filed a Motion to Withdraw Mandate so Application for Writ of Certiorari could be filed in the Supreme Court of the United States.

With the overruling of Appellant's Motion for Rehearing, Without Written Opinion, appellant has exhausted all remedy in this Court, and said judgment has become final on the docket of this Court.

WITNESS my hand and seal of said Court, at office in Austin, Texas, this 14th day of April, A. D. 1955.

Glenn Haynes
Clerk, Court of Criminal Appeals

FILED
MAY 23 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 679

GORDON SMITH,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari

JOHN BEN SHEPPERD
Attorney General of Texas

A. M. LECROIX
Assistant Attorney General
Capitol Station
Austin, Texas

Attorneys for Respondent,
The State of Texas

SUBJECT INDEX

	Page
Caption	1
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Argument and Authorities on Jurisdiction and Reasons for Denying Certiorari	5
Conclusion	17

LIST OF AUTHORITIES

Cases	Page
American Surety Co. v. Baldwin, 287 U.S. 156	9
Bollin v. Nebraska, 176 U.S. 83	9
Bowe v. Scott, 233 U.S. 658	9
Brown v. Massachusetts, 144 U.S. 573	10
Capital Nat. Bank v. Cadiz First Nat. Bank, 172 U.S. 425	9
Capin v. Fye, 179 U.S. 127	9
Denney v. Des Moines, 173 U.S. 193	9
Edelman v. California, 97 L.Ed. 227	10
Erie R. Co. v. Purdy, 185 U.S. 148	10
Fisher v. State, 107 Tex. Crim. 383, 2 S.W. 2d 249	11
Gorman v. Washington University, 316 U.S. 98	11
Harvel v. State, 126 Tex. Crim. 581, 72 S.W. 2d 604	11
Herndon v. Georgia, 295 U.S. 441	9
Hulbert v. Chicago, 202 U.S. 275	10
Jacobi v. Alabama, 187 U.S. 133	10
Kedkuk Bridge Co. v. Illinois, 175 U.S. 626	9
Lawlee v. Walker, 14 How. 149, 14 L.Ed. 364	9
Loeb v. Columbia Twp., 179 U.S. 472	11
Maxwell v. Newbold, 18 How. 511, 15 L.Ed. 506	9
Michigan Sugar Co. v. Dix, 185 U.S. 291	8
Mutual Life Ins. Co. v. McGrew, 188 U.S. 291	9, 10
New York Cent. R. Co. v. New York, 186 U.S. 269	9, 10
Oxley Stave Co. v. Butler County, 166 U.S. 648	6, 9, 10
Spies v. Illinois, 123 U.S. 131, 31 L.Ed. 80	10
Thomas v. Iowa, 209 U.S. 258	9, 16

BLEED THROUGH POOR COPY

Page

White River Lumber Co. v. Arkansas ex rel Applegate, 279 U.S. 692 16

Whitney v. California, 274 U.S. 357 16

Winona Land Co. v. Minnesota, 159 U.S. 540 9

Zweiz v. State, 74 Tex. Crim. 306, 171 S.W. 747 11

Statutes

United States Statute:
28 U.S.C. 1257(3) 2, 5

Constitution of United States:

Fifth and Sixth Amendments 2

Fourteenth Amendment 2, 3, 4, 6

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 679

GORDON SMITH,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari

---

Opinion Below

The opinion below of the Court of Criminal Appeals is reported at 273 S.W. 2d 623 and a copy of said opinion appears in Petitioner's Application in the Appendix thereto, pages 23 to 27. Said opinion was rendered and entered on November 10, 1954. A motion for rehearing was overruled without a written opinion on January 5, 1955. On motion made by Petitioner, the Texas Court of Criminal Appeals on January 19, 1955, revoked its mandate and ordered a stay of proceedings for ninety days to permit filing of Petitioner's Application for a Writ of Certiorari in this Honorable Court.

Jurisdiction

This Court does not have, nor should it exercise, jurisdiction under 28 U.S.C., 1257(3) because:

1. Nowhere in the trial record, and particularly in the Bills of Exceptions in the trial court, did Petitioner specially set up or claim any title, right, privilege or immunity under the Constitution of the United States.

2. The particular federal questions now sought to be raised in this Court were at no time presented to nor considered by the trial court or the Court of Criminal Appeals, and are being for the first time presented in the Application to this Court for Writ of Certiorari.

3. The decision of the Court of Criminal Appeals rests upon non-federal grounds which support its holdings.

4. The Fifth and Sixth Amendments to the Constitution of the United States apply only to the Federal Government and not to the States.

Respondent's argument in support of these jurisdictional points are made below under the heading "Argument and Authorities on Jurisdiction and Reasons for Denying Certiorari."

Questions Presented

1. Has this Court jurisdiction to consider an alleged violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States

BLEED THROUGH POOR COPY

(a) Where Petitioner never suggested nor presented to the trial court or to the Court of Criminal Appeals any reference to a federal question involving a violation of the due process clause of the Fourteenth Amendment,

(b) where the Court of Criminal Appeals did not consider nor determine any issues relating to the Fourteenth Amendment; and

(c) where, following a decision by the Court of Criminal Appeals, Petitioner again failed, in a motion for rehearing, to specially set out or claim any title, right, privilege or immunity under the Constitution of the United States?

2. Assuming, *arguendo*, that jurisdiction exists, did the Court of Criminal Appeals in affirming the trial court, deny Petitioner due process guaranteed by the Fourteenth Amendment of the Constitution of the United States?

Statement

(Respondent's record references are to the Statement of Facts and to the Transcript on file in the Court of Criminal Appeals of Texas.)

Petitioner, upon jury trial held in a District Court of Texas, was convicted of the offense of murder without malice (Tr. 16, 17). On appeal to the Court of Criminal Appeals of Texas, Petitioner contended (along with other alleged errors not before this Honorable Court for consideration) that the trial court erred in submitting paragraph 9 (Tr. 13) and para-

graph 7 (Tr. 12) of its charge to the jury, and in its refusal to give a requested charge on the law of circumstantial evidence (Tr. 5, Sup. Tr. 20). The only basis for his objection made in the trial court (Sup. Tr. 20) to the said paragraph 9 was that it "*requires of the defendant a greater burden* (of proof) *than is required by law.*" His objection in the trial court to the charge contained in paragraph 7 was that it was "*misleading to the jury,*" was "*a comment on the weight of evidence,*" .... "*places a greater burden of proof on the defendant than is required by law,*" . . . "*assumes that the said Susanna Martinez was killed,*" and "*is unintelligible, confusing and misleading to the jury*" (Sup. Tr. 19). No specific ground was given in the trial court for his objection to the failure to give a charge on the law of circumstantial evidence.

In his appeal brief to the Court of Criminal Appeals, Petitioner's sole argument was that the trial court committed reversible error for the same reasons upon which he bases his objections in the trial court and attempted by an extensive brief of State court decisions to show that the action complained of in the trial court was contrary to prior State decisions. There was no attempt made by Petitioner to specifically raise a federal question or claim.

Affirming the judgment of the trial court, the Court of Criminal Appeals in its opinion said nothing to even infer or intimate that the Court considered it had before it a federal question for decision, nor did the opinion use any language which might even remotely refer to *due process, Fourteenth Amendment,* or the *Constitution of the United States.* Even more indicative was the fact that *not*

BLEED THROUGH POOR COPY

one single federal case was cited in the entire opinion.

Petitioner then filed his Motion for Rehearing which was substantially a rehash of what had been relied on in his original brief to that Court. Not one single Federal case was cited, nor was the word Constitution even mentioned in such Motion for Rehearing. Rehearing was denied by the Court of Criminal Appeals without a written opinion.

A motion was then filed by Petitioner to withdraw the mandate in order for him to make Application to this Honorable Court for Writ of Certiorari and, at the same time, alleging that his application was to be based upon certain alleged infringements of Petitioner's constitutional rights. Here, for the first time, Petitioner specially set up or claimed a denial of his constitutional rights. Any contention that a federal question was raised at this point by a motion to withdraw the Court's mandate and that it was passed on by the highest court of this State is considered by Respondent so unmeritorious and frivolous as to be unworthy of further argument.

Argument and Authorities on Jurisdiction and Reasons for Denying Certiorari

It is respectfully submitted that Petitioner has not complied with the requirements of 28 U.S.C. 1257(3) sufficiently to invoke the jurisdiction of this Court, in that he has failed in State courts to specially set up or claim any title, right, privilege or immunity under the Fourteenth Amendment to the Constitution of the United States. Nowhere in the trial court record, and particularly in his Bills of

Exceptions, did Petitioner use any language or phraseology which could reasonably be said to notify the trial court of any federal question now being urged or that he was contending that his federal constitutional rights or privileges were being infringed upon. His objections and exceptions were couched in such seemingly state procedural terms as "*being contrary to law*," "*Wrongfully shifts the burden of proof to defendant*," "*misleading to the jury*," "*contrary to law*," etc. At no point in the state court proceeding did Petitioner use even such vague terms as "*denies due process*," "*unconstitutional*" or "*Fourteenth Amendment*"—much less did he point out an alleged specific violation of the Fourteenth Amendment of the Federal Constitution. It is here urged by Respondent that by the use of such vague terms as were urged by Petitioner all of the way through the State courts until after his Motion for Rehearing in the Court of Criminal Appeals had been denied, Petitioner could not and did not sufficiently raise a federal issue under the long line of decisions by this Honorable Court.

As early as 1897, in the case of *Oxley Stave Co. v. Butler County*, 166 U.S. 648, this Honorable Court laid down the rule that the jurisdiction of the Supreme Court to re-examine the final judgment of a state court cannot arise from a mere inference but only from averments so distinct and positive as to place it *beyond question* that the party bringing a case to it from the state court intended to assert a federal right. Respondent is of the firm belief that the *Oxley Stave* case is decisively controlling in the case in hand since in both cases the sole objections and exceptions raised in the state courts were

BLEED THROUGH POOR COPY

couched in terms of state procedural law, wholly void of any reference to the Constitution of the United States. Therefore, Respondent will take the liberty to extensively quote from the Opinion of Mr. Justice Harlan in that case as follows:

> "... But it [the Supreme Court of the United States] can not review such final judgment even if it denied some title, right, privilege, or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege, or immunity was 'specially set up or claimed' in the state court as belonging to such party under the Constitution, or some treaty, statute, commission, or authority of the United States. Rev. St. No. 709.
>
> "Looking into the record, *we do not find any reference was made in the court of original jurisdiction to the Constitution of the United States.* Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any federal right, privilege, or immunity was intended to be asserted. For aught that appears, the state court proceeded in its determination of the cause without any thought that it was expected to decide a federal question.
>
> "... The only remaining question was not otherwise raised than by the general allegation that the decree was rendered against dead persons, as well as in the absence of necessary parties, who had no opportunity to be heard in vindication of their rights. *Do such general allegations meet the statutory requirement* that the final judgment of a state court may be re-examined here if it denies some title, right, privilege, or immunity 'specially set up or claimed' under

the Constitution or authority of the United States? *We think not.* The specific contention *now* is that the decree of the Butler County Circuit Court in the suit instituted by the County of Butler was not consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States. But can it be claimed that the plaintiffs specially set up or claimed the protection of that amendment against the operation of that decree by simply averring—*without referring to the Constitution, or even adopting its phraseology* —that the decree was passed against deceased persons, as well as in the absence of necessary or indispensable parties?

"This question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in Section 709 of the Revised Statutes." (Emphasis supplied throughout. This brief.)

The rule was again re-affirmed by this Court in the case of *Michigan Sugar Co.* v. *Dix,* 185 U.S. 291 (1902) wherein Mr. Chief Justice Fuller used this language:

"The rule is firmly established, and has been frequently reiterated, that the jurisdiction of this court to re-examine the final judgment of a state court, under the 3rd division of § 709, can not arise from mere inference, but only from averments so distinct and positive as to place it *beyond question* that the party bringing the case here from such court intended to assert a Federal right. The statutory requirement is not met *unless the party unmistakably declares* that he invokes, for the protection of his rights, the Constitution, or some treaty, statute, commission, or authority, of the United States."

BLEED THROUGH POOR COPY

And this Court has held that the clause in the Constitution or the law of Congress under which the Federal right is claimed must be specified in the State court. *Maxwell v. Newbold*, 18 How. 511, 15 L. Ed. 506 (1856); *Lawlee v. Walker*, 14 How. 149, 14 L. Ed. 364 (1852). See also *New York Cent. R. Co. v. New York*, 186 U.S. 269 (1902); *Chapin v. Fye*, 179 U.S. 127 (1900); *Kedkuk Bridge Co. v. Illinois*, 175 U.S. 626 (1900); and that the claim must be unmistakable and not left to mere inference, *Winona Land Co. v. Minnesota*, 159 U.S. 540 (1895); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291 (1903); *Bollin v. Nebraska*, 176 U.S. 83 (1900); *Denney v. Des Moines*, 173 U.S. 193 (1899) *Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897).

This Court should not entertain jurisdiction to review final judgment of a state court upon an alleged federal right where the only objections in the State court were raised solely as a matter of State law. *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932) and objections made in the state court couched in the following language have been held not to sufficiently raise a federal question: "contrary to law," *Capital Nat. Bank v. Cadiz First Nat. Bank*, 172 U.S. 425 (1899); "denial of due process," *Bowe v. Scott*, 233 U.S. 658 (1914); *Thomas v. Iowa*, 209 U.S. 258 (1908); "Judgment void because of no breach of condition of surety bond, and had been entered without notice to the party, and was contrary to good conscience and equity," *American Surety Co. v. Baldwin*, supra. Also, the mere reference in the state court to the "Constitution of the United States," *Herndon v. Georgia*, 295 U.S. 441 (1935); or the "Constitution and laws of the United

States," *Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897), is insufficient.

In view of the above pronouncements of this Honorable Court, it is respectfully submitted that a review of the entire record of the trial court will reveal an absolute failure on the part of Petitioner to specially set up or claim a federal question in the trial court or in the appellate court.

Not only must Petitioner specially set up or claim his alleged federal right, but he must also raise the federal question at the proper time and in the proper way. *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291 (1903). The proper time is in the trial court when required by the state practice. *Spies v. Illinois*, 123 U.S. 131, *sub nom. ex parte Spies*, 31 L. Ed. 80 (1877); *Jacobi v. Alabama*, 187 U.S. 133 (1902); *Erie R. Co. v. Purdy*, 185 U.S. 148 (1902); See also *Hulbert v. Chicago*, 202 U.S. 275 (1906), (Complete failure to raise question at trial court level); *Brown v. Massachusetts*, 144 U.S. 573 (1892), (Failure to raise question before verdict held to be fatal); *Edelman v. California*, 97 L. Ed. 227 (question raised for first time as one of grounds for appeal); *Mutual Life Ins. Co. v. McGrew* supra, (failure to raise question in both trial court and on appeal), and it can not be denied under Texas procedure the question must be raised in the trial court since the scope of review by the Court of Criminal Appeals is limited to grounds or assignments of error which a defendant has preserved by an adequate Bill of Exceptions, and Motion for a New Trial in the trial court. The Texas Court has expressly held that such motions as are not thus set up or assigned cannot be considered by it on appeal.

BLEED THROUGH POOR COPY

Zweig v. State, 74 Tex. Crim. 306, 171 S.W. 747; *Harvel v. State*, 126 Tex. Crim. 581, 72 S.W. 2d 604; *Fisher v. State*, 107 Tex. Crim. 383, 2 S.W. 2d 249.

Thus it can be seen that Petitioner must specifically set up his claim and raise it in the trial court in the proper manner. *Loeb v. Columbia Twp.*, 179 U.S. 472 (1900), and the burden is upon him to affirmatively show that he has done so, since he is required to show affirmatively that this Court has jurisdiction. *Gorman v. Washington University*, 316 U.S. 98 (1942).

Has Petitioner discharged this burden? It is respectfully submitted that he has not. In fact, it is difficult to determine, even after careful study of his Application to this Court, the precise federal question alleged to have been set up and raised in the trial court and which same he is asking this Honorable Court to decide. In his Application (page 3) under the heading "Questions Presented for Review," he submits the following questions:

> "Question No. 1: In a State Court criminal prosecution, will the trial court be permitted to require of the defendant that he prove, or at least present sufficient proof to raise a reasonable doubt in the minds of the jury, that he was not guilty of one of the essential elements of the offense charged?"
>
> "Question No. 2: In the trial of a state court criminal case, will the trial judge be permitted to assume in the language of his charge to the jury that one of the essential elements of the offense charged should be taken as established in the absence of an admission thereof by the defendant?"

> "Question No. 3. In a state court prosecution for murder with a motor vehicle while under the influence of intoxicating liquor, when the record reveals there were no eye witnesses and no direct evidence pertaining to the identity of the driver of said automobile at the time of the collision, can the trial court deny the defendant a charge upon the law of circumstantial evidence with respect to whether or not the defendant was the actual driver of the automobile involved in the collision?"

Even though it is said these are the questions for this Court's review, are they in reality the federal questions he relies upon to have been answered wrong by the Court of Criminal Appeals? Are they even federal questions at all? It is submitted by Respondent that they are not. Even in submitting his supposed federal questions to the Supreme Court of the United States, he has again failed to include a reference even to the vague term "due process." He has not said "Is a defendant denied due process if the trial court does these things," or words to that effect.

Assuming it is implied that Petitioner *infers* his question to be that if the trial court does certain things, i.e., "require defendant to prove one of the essential elements of the offense charged," or "the trial court charge assumes one of the essential elements to be taken as established" or "refused to give a charge on law of circumstantial evidence when there is no direct evidence"—then does such action deny the due process guaranteed by the Fourteenth Amendment of the Constitution of the United States. If this is his true federal question, then did

PLEASE THROUGH BOOK COPY

the Court of Criminal Appeals undertake to pass upon it as required under this Court's decisions before it will undertake a review? Certainly not!

A review of the opinion will reveal only that the Court of Criminal Appeals held that under the State law (1) the charge as worded *did not* require the defendant to prove one of the essential elements of the offense, (2) the wording of the charge *did not* assume one of the essential elements to be taken as established, and (3) that *there was* in effect direct evidence, hence no circumstantial evidence charge was required. The court *did not* find that the trial court's charge shifted the burden of proof to the defendant, or that there was an assumption of one of the elements as true or that there was no direct evidence. If it had so found these things and then held that, even so, defendant was not denied "due process" then it could be said that they had decided a federal question.

Attention is further called to the fact that in the entire opinion of the State court not one single federal court case was cited nor did it in any way refer to "due process" or to the Fourteenth Amendment of the Constitution of the United States. The very wording of the questions, which Petitioner has submitted as the questions to be answered by this Court, reveals their impropriety since by an answer in his favor this Court would be *assuming* as untrue the very things which the Court of Criminal Appeals has expressly passed upon.

Respondent respectfully submits that before this Honorable Court should invoke its jurisdiction to review the decision of the highest court in the State, Petitioner's federal question should have been

whether or not, by its charge, the trial court did, in fact, improperly place the burden of proof of one of the essential elements on the defendant, assumed one of the essential elements to be taken as true, or failed to give a charge on the law of circumstantial evidence when there was no direct evidence in the case, and if the Court did either or all of these three things, did such action deny the defendant of his right to due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and such question must have been properly raised in the trial court. It cannot be said by any stretch of the imagination that such question was ever properly set up, presented to or passed upon by the trial court in this case.

In what court, or at what point in the State court proceeding, does the Petitioner claim that he was denied due process of law? The attention of this Honorable Court is further called to the fact that in spite of Petitioner's Application expressly submitting the above questions—all of which seem to complain of the action *in the trial court*—as the federal questions to be answered by this Honorable Court, yet not even once did he urge or allege that the *trial court* denied him due process of law, but instead, on page 2 of his Application, under the heading "Grounds on Which the Jurisdiction of this Court is Invoked" he urges the jurisdiction of this Court because

> "In each of the three particulars specified below, this Applicant has been denied due process of law . . . :

"(a) the opinion of the *Texas Court of Criminal Appeals* approved the action of the trial court . . .

"(b) the *Texas Court of Criminal Appeals* has deprived the Applicant of his essential right of trial by jury . . .

"(c) the *Texas Court of Criminal Appeals* has approved the action of the trial court in refusing to charge . . ."

In spite of the fact that the three specific federal questions sought to be reviewed by this Court, complain of the action in the *trial court*, yet, he is here urging this Court that the grounds on which he would invoke jurisdiction is that the Court of Criminal Appeals denied Applicant due process. Thus, is it not true that the actual federal question raised by the wording of Petitioner's Application is whether or not he was denied due process by the Court of Criminal Appeals instead of by the trial court? Such a question would be untenable as raising a federal question since it is alleged on page 2 of his Application, the Court of Criminal Appeals denied him due process of law *because* it approved the action of the trial court in doing such things as depriving the defendant of his presumption of innocence, assuming an essential element of the offense as proved, and failing to give a circumstantial evidence charge when there is no direct evidence. A review of the record and particularly the opinion of the Court of Criminal Appeals, as has already been

mentioned, shows that such was not the ruling of the Court of Criminal Appeals and therefore this could not be a federal question which can be said to have been decided incorrectly by the highest court of this State.

It appears that Petitioner is somewhat confused as to what precise federal question he is claiming to have seasonably raised at the proper time and in the proper State court. It is respectfully submitted that the true reason is that no substantial federal question has in fact been raised at all in the State court and that a federal question is being urged now for the first time on Application for Writ of Certiorari, which this Court has repeatedly held cannot be done. *White River Lumber Co. v. Arkansas, ex rel Applegate*, 279 U.S. 692 (1929); *Whitney v. California*, 274 U.S. 357 (1927); *Thomas v. Iowa*, 209 U.S. 258 (1908). Petitioner's only objections being so generally framed in language of State procedural law as to fail to apprise the State Court of the precise federal right claimed, he gave the trial and appellate courts below no federal question to decide, and such having occurred, this Court is without jurisdictional basis to grant a writ of certiorari. It is submitted that even if a federal question can be inferred to have been raised in the state court, such question was not raised in the trial court as required by State procedure. Or, if a federal question was properly before the Court of Criminal Appeals, that Court did not find it necessary to base its decision on the merits, if any, but that adequate State grounds existed for final determination of the cause.

Conclusion

For the foregoing reasons, Petitioner's Application for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN BEN SHEPPERD
Attorney General of Texas

A. M. LECROIX
Assistant Attorney General
Capitol Station
Austin, Texas

Attorneys for Respondent,
The State of Texas

May....., 1955

A copy of this Reply, together with a copy of the letter of transmittal to the Clerk of the United States Supreme Court, have been mailed this date to the following attorneys of record: for Applicant Karl L. Lovelady, Muleshoe, Texas; Harold O. Harriger & Nelson & McCleskey, Central American Life Building, Lubbock, Texas (First Class Postage Prepaid).